

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

GAVILON GRAIN, LLC

and

Cases 25-CA-264907  
25-CA-265798

LABORERS' INTERNATIONAL UNION OF NORTH  
AMERICA, LOCAL 1392

*Maxine Gallardo Miller, Esq.,*  
for the General Counsel.

*Patrick Barrett, Esq.,*  
for the Respondent.

*K. Grace Stranch and David Suetholz, Esqs.,*  
for the Charging Party.

DECISION

GEOFFREY CARTER, Administrative Law Judge. The General Counsel asserts that in August 2020, Gavilon Grain, LLC (Respondent) violated the National Labor Relations Act (the Act) by decreasing certain employee benefits, imposing more onerous working conditions and discharging one employee in retaliation for Respondent's employees' decision to seek representation by the Laborers' International Union of North America, Local 1392 (the Union) at Respondent's facility in Maceo, Kentucky. For the reasons explained below, I have determined that Respondent violated the Act by discriminating against employees as alleged in the complaint.

STATEMENT OF THE CASE

This case was tried by videoconference on February 22-23, 2021.<sup>1</sup> The Union filed the charge in Case 25-CA-264907 on August 19, 2020, and filed the charge in Case 25-CA-265798 on September 4, 2020.<sup>2</sup> The Union filed an amended charge in each of those cases on October 19, 2020. On November 25, 2020, the General Counsel issued a consolidated complaint in which it alleged that Respondent violated Section 8(a)(3) and (1) of the Act by taking the following actions because employees engaged in union and protected concerted activities: (a) decreasing benefits of its employees by prohibiting employees from storing items in Respondent's warehouse, prohibiting employees from clocking in before 6:45 a.m., and removing the employee ashtray and smoking area; (b) imposing more onerous and rigorous terms and conditions of employment by requiring employees to engage in additional cleaning

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<sup>1</sup> None of the parties objected to conducting the trial by videoconference. (Tr. 8-9.)

<sup>2</sup> All dates are in 2020, unless otherwise indicated.

duties and subjecting employees to closer scrutiny of their work assignments; and (c) discharging employee Zachary Baxter. Respondent filed a timely answer (and amended answer) denying the alleged violations in the consolidated complaint.

On the entire record,<sup>3</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party and Respondent, I make the following

## FINDINGS OF FACT<sup>4</sup>

### I. JURISDICTION

Respondent, a limited liability company with a place of business in Maceo, Kentucky, is in the business of buying, selling, and storing agricultural commodities. During the 12-month period ending on December 31, 2019, Respondent purchased and received at its Maceo, Kentucky facility goods valued in excess of \$50,000 directly from points outside the Commonwealth of Kentucky. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Respondent also admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. Respondent's Operations, Policies and Practices

##### 1. Respondent's operations and management

As indicated above, Respondent operates a grain elevator in Maceo, Kentucky (also known as the "Owensboro" facility).<sup>5</sup> The grain-handling facility is located next to the Ohio River, and approximately 10 employees worked at the facility in the time period relevant to this

<sup>3</sup> The transcripts and exhibits in this case generally are accurate. However, I hereby make the following corrections to the trial transcripts: p. 8, l. 14: "Board member by the" should be "Board member, the"; p. 8, l. 14: "we" should be "they"; p. 16, l. 1: "contextual" should be "pretextual"; p. 19, l. 13: "discriminate" should be "discriminatee"; p. 24, l. 4: "was" should be "wasn't"; p. 25, l. 4: "disposed" should be "disclosed"; p. 26, l. 19: "they're" should be "their"; p. 46, l. 19: "awing" should be "awning"; p. 67, l. 11: "easter" should be "eastern"; p. 76, l. 16: "integrated" should be "interrogated"; p. 187, l. 15: "a (inaudible)" should be "admissible"; p. 221, l. 7: "conservative" should be "custodian"; p. 259, l. 17: "grad" should be "grade"; p. 272, l. 20: "a" should be "at"; p. 297, l. 14: "leave" should be "delete"; p. 300, l. 13: "1" should be "2"; and p. 311, l. 23: "trolls" should be "scrolls".

<sup>4</sup> Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

<sup>5</sup> The Owensboro facility is one of approximately 140 facilities that a larger entity, Gavilon Group, LLC, operates worldwide. Gavilon Group, LLC, is based in Omaha, Nebraska, and employs approximately 2000 employees worldwide. (Jt. Exh. 1; Tr. 303-304.)

case. In general, Respondent's employees load and unload trucks, barges and railcars and store grain of various types and grades in the grain elevator for sale at a later date. (Jt. Exh. 1, pars. 2–4 (noting that Respondent stores yellow corn, soybeans, soft red winter wheat, white corn, non-GMO yellow corn, and non-GMO soybeans in the Owensboro facility); Tr. 85, 97, 184, 245–246, 257–260; see also R. Exh. 21 (aerial photograph of the grain elevator and surrounding buildings).)

In the February – August 2020 timeframe, assistant superintendent Harold Baxter<sup>6</sup> was responsible for supervising grain elevator employees. Location manager Trevor Hamilton also worked at the Owensboro facility in the same timeframe but focused more on financial transactions such as buying and selling grain and supervised two merchandisers and two accountants. Hamilton's office is located approximately 200 yards away from the grain elevator, but Hamilton would visit the grain elevator occasionally to check in and see how things were running. Harold Baxter and other grain elevator employees believed that Hamilton was Harold Baxter's supervisor, but in actuality regional operations manager Derrick Fanton supervises Harold Baxter in Respondent's chain of command (though Fanton's office is located in Henderson, Kentucky). Fanton became regional operations manager in June 2020, and manages projects for 9 locations, one of which is the Owensboro facility. Before August 12, 2020, Fanton visited the Owensboro facility 1–4 times per month to inspect the site but did not supervise grain elevator employees during his visits. (Tr. 42, 95–99, 121, 126, 164, 175, 183, 211–213, 234–237, 246; Jt. Exh. 1 (pars. 7–8).)

## 2. Part-time work

Respondent's employee handbook states that "[t]he majority of employees at Gavilon are regular full-time employees who are eligible to receive Gavilon benefits (if they work at least thirty (30) hours per week) and are included in the annual compensation process. Gavilon does, however, employ part-time employees. Part-time employees work less than thirty (30) hours per week." (R. Exh. 3, p. 25.) At the Owensboro facility, Harold Baxter handled employees' requests to work part-time by first discussing the request with the location manager (Hamilton, in 2019 and 2020), and then contacting the human resources department for formal approval. (Tr. 174–175, 199.)

Consistent with the employee handbook, both Zachary Baxter and employee A.L. worked part-time at the Owensboro facility. For example, on April 3, 2019, Respondent approved a request to switch Zachary Baxter from part-time to full-time status. Before that approval, Zachary Baxter worked multiple shifts while in a part-time status, including weekend shifts on January 26, March 2, 10, and 16, and weekday shifts on March 27–28 and April 1–2. (GC Exh. 3(b) (noting that Harold Baxter contacted human resources on March 29, 2019, to request changing Zachary Baxter from part-time to full-time); CP Exh. 1; see also Tr. 31–33, 73, 166–

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<sup>6</sup> From about 2004–2020, Harold Baxter worked as either assistant superintendent or superintendent at the facility. Respondent demoted Harold Baxter from superintendent to assistant superintendent in September 2019, but the superintendent position was vacant from March 2020 through August 17, 2020, leaving Harold Baxter as the primary supervisor at the grain elevator during that timeframe. Harold Baxter is the father of Zachary and Patrick Baxter, each of whom also worked at the facility in the relevant time period (June – August 2020). (Tr. 68–69, 85, 150, 156–157, 164, 189, 195–198; Jt. Exh. 1 (par. 7).)

167 (explaining that from 2014 to 2020, Zachary Baxter was in a part-time status with Respondent for five or six different time periods when he was in college or working for another employer); GC Exhs. 3(e)–(f) (email approvals to place Zachary Baxter in part-time status in November 2016 and May 2018).) Similarly, on March 29, 2019, Respondent approved a request to place employee A.L. in a part-time status. Employee A.L. subsequently worked a part-time weekday shift on June 25, 2019, and was not formally terminated (due to resignation) until February 25, 2020. (GC Exh. 3(d); CP Exh. 2; R. Exh. 14; Tr. 169.)

### 3. Clock-in times

Before August 12, 2020, Respondent did not have an established clock-in time, but generally followed a 7 a.m. to 4 or 5 p.m. work schedule. In the first 30–45 minutes after arriving and clocking in, employees attend a daily staff meeting, turn on any necessary machinery, and perform any required maintenance. Employees then began loading and unloading trucks and barges at around 7:30 a.m. That general schedule, however, varies with the seasons. In busier seasons that arise from about August through November and January through March, trucks may arrive as early as 7 or 7:15 a.m., such that employees may need to arrive as early as 6:15 or 6:30 a.m. to take care of preliminary tasks before starting to load and unload trucks and barges. Similarly, in a busy season, employees might need to stay well into the evening hours to finish their duties. Respondent maintains a code of conduct that requires employees to report their work hours truthfully and accurately. (Tr. 31–32, 49, 60–61, 84–85, 97, 113, 127–130, 165–166, 199–200, 243, 271–272; Jt. Exh. 1 (par. 3); R. Exh. 4 (par. 15); GC Exh. 8 (showing that employees occasionally clocked out after 10:00 p.m. in 2020).)

In 2020, employee clock-in and clock-out times were consistent with these general parameters. Specifically, between January 1 and August 12, 2020, employees clocked in and out between the following times:

Employee	Earliest Clock-In Time	Most Common Clock-In Range (i.e., time range for majority of clock-ins)
Patrick Baxter	6:19 a.m. (July 10)	6:40 – 7:10 a.m.
Zachary Baxter	6:19 a.m. (July 10)	6:25 – 6:55 a.m.
K.C.	6:52 a.m. (May 27)	6:55 – 7:20 a.m.
B.H.	6:42 a.m. (Feb. 6 & July 27)	6:45 – 7:10 a.m.
K.H.	6:15 a.m. (June 29 & 30)	6:25 – 6:50 a.m.
D.K.	6:41 a.m. (Jan. 10)	6:45 – 7:15 a.m.
Z.M.	6:22 a.m. (April 27)	6:40 – 7:10 a.m.
S.S.	6:34 a.m. (Jan. 30)	6:45 – 7:15 a.m.
D.W.	6:08 a.m. (May 27)	6:10 – 6:30 a.m.

(GC Exh. 8; see also Tr. 79–80 (noting that Zachary Baxter usually clocked in at 6:30 or 6:45 a.m.), 197–198 (noting that Harold Baxter was responsible for approving employee timecards between January 1 and August 14, 2020).)

#### 4. Cleaning responsibilities

Respondent maintains a grain housekeeping program (policy) to prevent fires and explosions in grain elevators and storage warehouses and to comply with the grain handling standards of the Occupational Safety and Health Administration. The primary requirements of the grain housekeeping program are: understand the requirements of the housekeeping program; train employees so they understand the importance of housekeeping; identify and document priority areas of the facility; immediately remove grain dust accumulations over 1/8 inches in priority areas; inspect priority areas daily and the entire facility weekly; conduct monthly plant inspections; and conduct an annual program. Priority areas are generally floor areas within 35 feet of an inside bucket elevator, enclosed areas with grinding equipment; and enclosed areas with inside grain dryers. Regarding the frequency of cleaning, Respondent's housekeeping program specifies that Respondent "will check priority areas daily and clean as needed, or as soon as the priority areas have 1/8-inch or greater grain dust accumulation. If grain dust exceeds 1/8-inch, then operation[s] must be shut down and immediate housekeeping must take place in that area." (R. Exh. 5 (pars. 3, 3.3.1); Tr. 251, 253–255, 273–274; see also R. Exhs. 1–2 (job descriptions noting that grain elevator technicians have housekeeping responsibilities, with scale operators acting as general backups for grain elevator technicians as needed); Tr. 266–269.)

At the Owensboro facility, many of the cleaning duties focused on grain and grain dust that accumulated in and around the "boot pit," an area below the "pit" where trucks would dump grain deliveries. Before August 12, Respondent's employees usually handled their cleaning duties at the end of the day after all truck deliveries were completed. That cleaning schedule enabled employees to work on other duties throughout the day, and also avoided the need to clean spaces repetitively (i.e., if employees cleaned in the middle of the day, the same areas would likely need cleaning again by the day's end). If work was slow, however, employees would clean more frequently during their shifts. (Tr. 62, 129, 144–146, 184–185, 213, 260.) There is no evidence of any occasions where employees had to immediately clean a priority area because accumulated grain dust exceeded the 1/8-inch threshold stated in Respondent's housekeeping program.

#### 5. Designated smoking area

Respondent maintains a "Smoking Area and Materials Program" to minimize threats of fires and explosions from smoking activities. As part of that program, facilities must: designate a smoking area (or prohibit smoking altogether); post a sign noting the location of the designated smoking area; prohibit smoking and smoking materials except in designated areas; provide adequate smoking receptacles; and clean out smoking receptacles frequently. The designated smoking area must be at least 35 feet or separated by a suitable barrier (such as a wall) from the operational areas of the facility and any storage/transfer/processing areas for: ammonium nitrate; flammable and combustible materials; grains; or ingredients. (R. Exh. 6; see also Tr. 264–265.)

For 5 or more years, the smoking area at the Owensboro facility has been located next to a small office and locker room building (the "back office") at least 100 feet away from the grain elevator. Respondent provided a smoking receptacle next to a set of four steps leading up to the porch, and employees congregated on the porch to smoke and talk during breaks. In 2019 or 2020, Respondent's operations team approved installing an awning to provide shade for

employees when employees gathered on the back office porch. There is no credible evidence that Respondent previously raised concerns about the location of smoking area/receptacle,<sup>7</sup> and there is no evidence that Respondent has ever been issued a safety violation based on the location of the smoking area/receptacle. (GC Exh. 5; R. Exh. 7; Tr. 36, 45–46, 48–49, 105–106, 138, 180–182, 193, 212–214, 260–263; see also R. Exh. 21 and Tr. 257, 262–263 (aerial view of the grain elevator and back office, showing the back office next to a row of parked cars).)

*B. June 3, 2020 – Email Regarding Expectations after Wage Increase*

On June 3, 2020, director of operations (East) Tom Lechtenberg emailed Fanton (with Hamilton copied) to suggest that Fanton meet with employees at the Owensboro facility. Fanton was new in his regional operations manager position as of June 2020, and Lechtenberg hoped that Fanton would meet with employees to outline his expectations, particularly in light of a recent wage increase that employees received. Lechtenberg stated as follows:

Derrick,

I sent this to Trevor also, but if you can take the time, I think it would be good for you to set down with them and explain some of your expectations going forward. If you want Harold to sit in with them that is fine or if not it is fine. I would like part of the message to be expectations of keeping the place clean and tidy and looking for things to do to make the place better. Other expectations of following policies and procedures.

They are all getting good [percentage] increases and I want to make sure that they understand that there are expectations that go along with these increase[s].

(R. Exh. 20; see also Tr. 246–250, 273.)

*C. Late July 2020 – The First Union Meeting*

In about late July 2020, Zachary Baxter and a few coworkers contacted the Union and arranged to meet with Union business manager Vince Casey on July 22 at the union hall. At the meeting, employees spoke with Casey about working conditions and what the Union could do to assist employees. Although he was a supervisor, Harold Baxter also attended the July 22 meeting but did not comment beyond saying that employees needed to do what they thought was right for them. There is no evidence that any managers (besides Harold Baxter) were aware that employees met with the Union on July 22. (Tr. 34–36, 130–132, 150–152, 175–177, 200, 279–281, 288.)

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<sup>7</sup> I do not credit Hamilton's testimony that he thinks someone in Respondent's operations department raised concerns before August 12, 2020, about the smoking area at the Owensboro facility being out of compliance with Respondent's smoking area policy. (See Tr. 106, 119.) Hamilton's testimony on this point was vague insofar as he did not provide any details about who raised concerns or when the conversation(s) occurred, and the evidentiary record does not include any documentation to corroborate Hamilton's testimony on the issue.

*D. August 10 – Zachary Baxter Requests Part-Time Status*

In about early August, Zachary Baxter accepted a full-time job with another employer. Accordingly, Zachary Baxter separately notified Harold Baxter (on about August 10) and  
 5 Hamilton (on about August 11) that he would be starting a new job after August 14 but wished to continue working for Respondent nights and weekends on a part-time basis, effective August 17. Both Harold Baxter and Hamilton indicated that they were okay with Zachary Baxter's plan to switch to part-time employment with Respondent.<sup>8</sup> (Tr. 33–34, 71–72, 74–76, 81–83, 116, 189–191, 201–202.)

*E. August 11 – The Second Union Meeting*

On August 11, a group of employees, including Zachary Baxter, met again with Union business agent Casey at the union hall. Harold Baxter also attended the meeting as an observer.  
 15 Casey advised the employees that he planned to visit the Owensboro facility the next day to let Respondent know that employees wished to have the Union serve as their collective-bargaining representative. Casey also provided employees with union t-shirts and hats to wear to work on the day of his visit. There is no evidence that any of Respondent's supervisors (besides Harold Baxter) knew that employees were meeting with Casey to discuss union representation. (Tr. 37–  
 20 38, 70–71, 132–133, 150–152, 176–177, 200, 203–204, 281–282, 288.)

*F. August 12 – Casey Visits the Owensboro Facility and Respondent Reacts*

In the morning on August 12, Casey went to the Owensboro facility. Initially, Casey  
 25 greeted employees who were gathered at the back office and wearing union shirts and hats. (As of August 12, Respondent employed 6 non-managerial employees at the Owensboro facility; all 6 of those employees were on duty on August 12.) Next, Casey met with Hamilton (in Hamilton's office) and requested that Respondent voluntarily recognize the Union as the employees' bargaining representative based on the Union having authorization cards signed by  
 30 100 percent of the employees at the facility. Hamilton replied that he would need to present the issue to the corporate office. Casey then left the facility. (Tr. 38, 100, 133–134, 202–203, 282;

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<sup>8</sup> I do not credit Hamilton's testimony that Zachary Baxter simply gave notice that August 14 would be his last day of work for Respondent. (Tr. 116.) Hamilton later admitted that Zachary Baxter asked to switch to part-time employment but was denied because Respondent does not offer part-time work on weekends. (Tr. 118.)

Hamilton's admission is important for two reasons. First, Hamilton's admission undercuts Respondent's argument that Zachary Baxter simply quit on August 14 to start his new job and corroborates Harold and Zachary Baxter's testimony that Zachary Baxter's plan was to continue working for Respondent on a part-time basis. (See Tr. 190–191, 201–202 (Harold Baxter testimony explaining that Zachary Baxter "quit" working for Respondent on August 14 because Respondent did not permit him to work part-time).) Second, Hamilton's admission weakens his credibility, because Hamilton: (a) contradicted his earlier testimony that Zachary Baxter merely gave notice that he was resigning; and (b) offered an explanation for Zachary Baxter not receiving part-time status (Hamilton's assertion that Respondent does not offer part time work on weekends) that is undermined by evidence that Zachary Baxter worked several weekend shifts for Respondent in 2019 while in part-time status. (See Findings of Fact (FOF), Section II(A)(2), *supra*.)

GC Exh. 8 (indicating that Zachary Baxter, Patrick Baxter, and employees K.C., B.H., K.H. and D.W. were employed at the facility as of August 12).)

After meeting with Casey, Hamilton telephoned Harold Baxter to ask what he knew about the Union's request for recognition and which employees were involved. Baxter stated that he did not know who started discussions with the Union and was not going to talk to any employees about the issue. Hamilton also notified Fanton that a union representative had shown up at the Owensboro facility. Fanton, in turn, notified Lechtenberg and Respondent's human resources office. (Tr. 100, 177, 203, 238.)

In the afternoon on August 12, Hamilton, Fanton, Lechtenberg and senior director of human resources James Saroka arranged a conference call to talk with Harold Baxter further about the Union's visit and request for recognition. During the call, participants asked Baxter if he had any knowledge of which employees started discussions with the Union and what might have caused employees to contact the Union. Baxter indicated that some employees were not happy with their work hours and denied that he played a role in getting the Union involved. (Tr. 101, 119, 179–180, 203, 206, 238, 240–241; GC Exh. 7.)

#### *G. August 12–14 – Fanton and Hamilton Interact with Employees at the Grain Elevator*

##### 1. Overview

Between the August 12 discussions with Harold Baxter about how the Union got involved with Respondent's employees, and continuing into August 13, Hamilton and Fanton visited the grain elevator and spent more time onsite than before August 12. Hamilton and Fanton made several changes to working conditions while at the facility in this timeframe, and assigned employees assorted odd jobs. On August 13, Hamilton was "barking orders" to employees so extensively that Harold Baxter suggested that Hamilton return to his (Hamilton's) office to calm down. Hamilton responded, "if that's the way they want to play, then that's [the] way we're going to do it." (Tr. 41–42, 104, 135–137, 178–181, 183, 236–237, 275; see also Tr. 43–44, 56, 135 (noting that Hamilton and Fanton had a somewhat frantic, hostile and defensive demeanor during their visits on August 12–13).)

##### 2. Scrutiny of work assignments

Starting on August 12, Hamilton and Fanton began observing employees who were working on the barge or in the pit area where trucks dumped grain. While observing employees on the barge, Hamilton and Fanton were in very close proximity to employees who were working because the employees were primarily in a 10-foot by 10-foot "shack" where the barge controls were located. Hamilton and Fanton also monitored employees working in the pit from a close distance, often standing 5 feet away from employees who were working in that location. (Tr. 52–56, 76–77, 83–84, 102–104, 137, 243.)

##### 3. Cleaning and housekeeping

As part of their directives on and after August 12, Hamilton and Fanton began instructing employees to immediately perform various cleaning duties (such as picking up items around the

shop or cleaning up the basement and boot pit) instead of cleaning at the end of the day. While the additional cleaning did not prevent employees from loading and unloading barges and trucks in a timely manner, the cleaning was repetitive because areas that employees cleaned during the day had to be cleaned again later. (Tr. 44, 62–63, 135–138, 144, 146, 183–185, 237–238.)

- 5 There is no evidence that any of the cleaning assignments were prompted by grain dust in a priority area exceeding the 1/8–inch threshold described in Respondent’s housekeeping policy.<sup>9</sup>

#### 4. Smoking area location

- 10 On August 12 or 13, Respondent (through Hamilton) moved the smoking location away from the back office. Specifically, instead of having the smoking receptacle next to the back office porch, Respondent moved the smoking receptacle across the gravel parking lot to a location about 50–60 feet away from the back office.<sup>10</sup> Respondent did not tell employees why it moved the designated smoking area, but Hamilton did tell Harold Baxter that the smoking  
15 receptacle needed to be moved because it was too close to the back office.<sup>11</sup> (Tr. 45–47, 50, 105–107, 138–139, 180–182; GC Exh. 5 (showing the back office porch and the new location of the smoking receptacle in the gravel lot); see also R. Exh. 21 (aerial view of the back office and gravel parking lot).)

#### 20 5. Clock-in time restrictions

At the end of the workday on August 12, employees received word that Respondent would no longer allow anyone at the facility to clock in before 6:45 a.m. (Fanton made the decision but another employee notified employees about the new rule). Respondent did not tell

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<sup>9</sup> Fanton denied imposing additional housekeeping duties on employees because they expressed an interest in the Union (see Tr. 268), but I do not give any weight to that testimony. At a minimum, Fanton (who had just become regional manager over the Owensboro facility in June 2020) went along with Hamilton’s move to be more demanding of employees at the facility as a reaction to the employees’ request that the Union serve as their bargaining representative.

<sup>10</sup> The witnesses provided varied estimates for the distance between the original and new smoking areas. (See Tr. 45, 182, 260–262 (estimating the distance to be as far as 100–150 feet).) I found the photograph evidence to be most reliable and arrived at the 50–60 feet estimate based on the photographs and accompanying witness testimony. (See GC Exh. 5; R. Exh. 21; Tr. 262–263.)

<sup>11</sup> During trial, Hamilton and Fanton testified that the smoking location next to the back office porch was not in compliance with corporate policy because the location was less than 35 feet away from a tool shed/shop building that contained flammable materials. Hamilton added, however, that by August 17, someone had moved the smoking receptacle back to the original location next to the back office porch. When asked if he moved the receptacle again, Hamilton was not certain but indicated that Respondent may have allowed the smoking receptacle to stay in its original location for a while. (Tr. 105–107, 119–120, 122–123, 261–263, 274–275; see also Tr. 108–109 (indicating that Respondent discussed moving the smoking area at a morning meeting with employees later in August).)

Based on this evidence, I do not credit Hamilton’s and Fanton’s testimony that the original smoking location violated corporate policy. First, Respondent maintained the smoking area in its original location for several years. Second, if the original location truly posed a problem, Respondent would have shown more urgency in moving the smoking receptacle again when it discovered (on August 17) that someone had moved the receptacle back to the original location. Given the history of having the smoking location next to the back office and Respondent’s casual approach to addressing the smoking area location after August 17, I do not find that the original smoking area location violated corporate policy.

employees why it implemented the new restrictions on clock-in times, but made this change to “get everybody on the same page” instead of having a variety of times that employees were clocking in. (Tr. 45, 49–50, 80, 114, 128, 185–186, 242–243, 270; see also Tr. 113, 272 (noting that during busier seasons Respondent allows employees to clock in before 6:45 a.m.).)

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#### 6. Storage of personal items in Respondent’s warehouse

On May 20, 2020, Respondent leased a warehouse at the Owensboro facility to a tenant, RDS, Inc. (RDS), for the purpose of storing farming equipment. Hamilton signed the lease on Respondent’s behalf. Based on a conversation with the president of RDS, Harold Baxter believed that it would be permissible to allow employee K.C. to store (or continue storing) personal items in the warehouse and allowed employee K.C. to do so. (R. Exh. 13; Tr. 139, 186–188, 207, 210, 215–216.)

On about August 13, 2020, Hamilton notified Harold Baxter that employee K.C. needed to remove his personal items from the warehouse within 24 hours or risk Respondent throwing the items away.<sup>12</sup> Accordingly, after the workday concluded, Harold Baxter and other employees used their personal vehicles and trailers to pack up employee K.C.’s items that were in the warehouse and take the items to another location. (Tr. 44, 104–105, 140–141, 188–189, 209–210; see also GC Exh. 8 (indicating that employees finished their workdays on August 13–14 by 4:20 p.m.).)

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#### *H. August 14 – Respondent Notifies Zachary Baxter that He Will Not Be Permitted to Continue Working for Respondent on a Part-Time Basis*

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On August 14, Zachary Baxter reported to work his assigned shift. In the late morning, Zachary Baxter learned that Respondent would not permit him to work for Respondent as a part-time employee.<sup>13</sup> Consistent with that news, when Zachary Baxter clocked out at the end of the

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<sup>12</sup> I do not credit Hamilton’s testimony that he had instructed Harold Baxter multiple times to tell employee K.C. to remove his personal items from the warehouse, and I do not credit Hamilton’s testimony that “it had been an ongoing two-year issue about having personal belongings out there.” (Tr. 104–105; compare Tr. 215–217 (Harold Baxter testimony that no one instructed him to tell employee K.C. to remove his personal items from the warehouse).) The evidentiary record shows that Harold Baxter responded immediately when directed on August 13 to have employee K.C. remove his items from the warehouse. It does not stand to reason that Harold Baxter would have disregarded similar previous directives, or that Hamilton would have tolerated Baxter disregarding any of those prior directives.

I also do not credit Hamilton’s testimony that suggested his directive to empty the warehouse was prompted by a request from RDS, the warehouse tenant. Hamilton’s testimony on that point was extremely vague and limited to “It was just — I was told via phone call, and said I would take care of it.” (Tr. 105.) The lack of any details about who he spoke to and when, coupled with the lack of any corroborating evidence, renders Hamilton’s testimony unreliable. Further, to the extent that Hamilton testified that, before receiving the phone call, he assumed that personal items had been removed from the warehouse, I note that Hamilton’s testimony conflicts with his assertion that he instructed Harold Baxter multiple times to have employees remove personal items from the warehouse (i.e., if it was an ongoing and persistent problem, then Hamilton had no basis to assume that personal items had been removed from the warehouse).

<sup>13</sup> The evidentiary record is not clear on who told Zachary Baxter that Respondent would not permit him to work part-time. (See Tr. 58 (Zachary Baxter testified that the superintendent notified him), 118

workday, an employee instructed him to turn in his gate and facility keys, and Baxter complied. That same day, Hamilton signed a “Termination Form” that indicated that Zachary Baxter resigned to take another job and was not eligible for rehire. (Tr. 32, 56–58, 202, 215–216, 309–311; R. Exh. 11; GC Exh. 8; see also Tr. 31 (noting that Zachary Baxter began working full-time in his new job on August 17), 118, 120 (noting that Respondent hired several full-time temporary employees in mid–September 2020, because that was one of Respondent’s busy seasons, but did not hire Zachary Baxter for part-time work); R. Exh. 14 at 2, 4–7 (indicating that, excluding Zachary Baxter, Respondent was willing to rehire 4 out of 5 employees who quit or resigned working for Respondent in 2019–2020).)

### *I. Developments after August 14*

#### *1. Management at the grain elevator*

In the morning on August 17, Hamilton and Fanton notified employees that Respondent terminated Harold Baxter’s employment. Fanton, who became interim superintendent due to Harold Baxter’s termination, also reiterated that employees should not clock in before 6:45 a.m. Thereafter, Fanton was at the Owensboro facility more regularly to carry out his duties as interim superintendent. (Tr. 103–104, 107–108, 114, 156, 201, 255; Jt. Exh. 1 (par. 7).)

#### *2. Union organizing and election results*

On about August 14, the Union filed an election petition. Periodically thereafter, Hamilton and Fanton spoke with employees about the Union’s election history (i.e., where the Union had won and lost elections in the past) and expressed the view that it would not be a good idea for employees to bring the Union in. (Tr. 141–142, 160–161, 242–245, 294.)

Under a stipulated election agreement, employees voted in a mail ballot election between September 18 and 30, 2020. On October 28, 2020, the Board certified that a majority of valid ballots were not in favor of the Union. No objections to the election were filed. (Jt. Exh. 1 (par. 6); Tr. 159–160, 217, 289–290, 294–295.)

## DISCUSSION AND ANALYSIS

### *A. Credibility Findings*

A credibility determination may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness’ testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014) (noting that an administrative law judge may draw an adverse inference from a party’s failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party’s

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(Hamilton could not recall how Baxter was notified).)

agent). To the extent that credibility issues arose in this case, I have stated my credibility findings in the Findings of Fact above.

*B. Did Respondent Violate Section 8(a)(3) and (1) of the Act by Discriminating Against Employees Because They Engaged in Union Activities?*

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by discriminating against employees because they engaged in union and protected concerted activities. Specifically, the General Counsel alleges that unlawfully discriminated against employees by, on about August 12–14, 2020, taking the following employment actions: prohibiting employees from storing items in Respondent’s warehouse; prohibiting employees from clocking in before 6:45 a.m.; removing the employee ashtray and smoking area; requiring employees to engage in additional cleaning duties; subjecting employees to closer scrutiny of their work assignments; and discharging employee Zachary Baxter.

2. Applicable legal standard

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that the employee’s union or other protected activity was a motivating factor in the employer’s decision. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 2–3 (2019). Proof of discriminatory motivation (animus) can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. Circumstantial evidence of discriminatory motivation may include evidence of: suspicious timing; false or shifting reasons provided for the adverse employment action; failure to conduct a meaningful investigation of alleged employee misconduct; departures from past practices; tolerance of behavior for which the employee was allegedly fired; and/or disparate treatment of the employee. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 4, 8 (2019); *Medic One, Inc.*, 331 NLRB 464, 475 (2000). The evidence must be sufficient to establish that a causal relationship exists between the employee’s protected activity and the employer’s adverse action against the employee. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 8.

If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee’s union or protected activity. In order to meet that burden, the employer need not prove that the disciplined employee committed the misconduct alleged. Instead, the employer only needs to show that it had a reasonable belief that the employee committed the alleged offense, and that it acted on that belief when it took the disciplinary action against the employee. *McKesson Drug Co.*, 337 NLRB 935, 937 fn. 7 (2002); see also *Bally’s Atlantic City*, 355 NLRB 1319, 1321 (2010) (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the respondent’s rebuttal burden is

substantial), enfd. 646 F.3d 929 (D.C. Cir. 2011). The General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. When the employer's stated reasons for its decision are found to be pretextual – that is, either false or not in fact relied upon – discriminatory motive may be inferred but such an inference is not compelled. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (noting that the Board may infer from the pretextual nature of an employer's proffered justification that the employer acted out of union animus where the surrounding facts tend to reinforce that inference). A respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 861.

### 3. Analysis – the General Counsel's initial showing of discrimination

The General Counsel's central theory in this case is that after Casey asked Respondent to voluntarily recognize the Union on August 12, Respondent acted swiftly to retaliate against employees who supported the Union and, in the process, nip any union organizing in the bud. (See GC Posttrial Br. at 1.) I agree with the General Counsel's theory. Respondent's motive to retaliate against employees because of their union activities explains all of the adverse employment actions that occurred on August 12–14, including the more onerous working conditions, the loss of employee benefits/amenities, and the discharge of Zachary Baxter. While Respondent maintains that it was simply taking appropriate action to manage the employees at the grain elevator, the evidentiary record (as I describe below when I address Respondent's affirmative defenses) shows that Respondent was fine with all of the workplace practices in question until the Union requested recognition on August 12.

The General Counsel supported its retaliation theory by making an initial showing that the employees' union or other protected activities were a motivating factor in Respondent's decisions to take the adverse employment actions at issue. All 6 employees engaged in union activities by signing authorization cards, and many of those employees also wore union shirts or other attire on August 12 to demonstrate their support for the Union. Respondent was aware of the employees' union activity because Casey told Hamilton that 100 percent of the employees signed authorization cards (i.e., all 6 employees who were working at the grain elevator), and employees wore their union attire in plain view on the same day that Casey visited and asked Respondent to recognize the Union.<sup>14</sup> The suspicious timing of Respondent's various adverse employment decisions (each of which occurred on the same day or 1–2 days after Casey visited) is strong evidence of animus, but Hamilton made the animus and retaliation explicit on August

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<sup>14</sup> Since Casey informed Hamilton that 100 percent of the employees supported the Union, that raises the question of why Zachary Baxter, and to a lesser extent employee K.C., bore the brunt of Respondent's ensuing adverse employment actions against employees. Charging Party suggests that Zachary Baxter was the "lead organizer" among employees who sought to unionize (see CP Posttrial Br. at 8), but I do not find that Respondent was aware that Zachary Baxter had such a role. Instead, I find that both Zachary Baxter and employee K.C. were convenient targets for Respondent's anger with all 6 employees because Zachary Baxter's and employee K.C.'s circumstances made them stand out from the group. Specifically, Zachary Baxter was in the process of switching from full-time to part-time status, while employee K.C. was the only employee who was storing personal items in the warehouse. While Respondent tolerated those activities in the past, Respondent targeted them for elimination once the Union sought recognition on August 12.

13 when Hamilton (in response to Harold Baxter pointing out that Hamilton should take a break  
from barking out orders to employees) said “if that’s the way they want to play, then that’s [the]  
way we’re going to do it.” (FOF, Section II(F)–(G)(1).) Hamilton’s message was clear – if  
employees were going to engage in union activities, there would be a price to pay regarding their  
5 working conditions.

Since the General Counsel made an initial showing of discrimination, the burden shifts to  
Respondent to prove that it would have taken the same actions even in the absence of employees’  
union activities. I address the affirmative defenses for each of the disputed adverse employment  
10 actions below.

4. Analysis – affirmative defense for more onerous working conditions (additional cleaning  
duties and closer scrutiny of work assignments)

Respondent maintains that Hamilton and Fanton spent more time at the facility  
supervising employees on and after August 12 because Harold Baxter was not providing  
adequate leadership.<sup>15</sup> As for the additional cleaning, Respondent asserts that this was a natural  
development based on Respondent’s June 3 email to Fanton about the expectations of employees  
after their wage increase, and further asserts that the additional cleaning is consistent with  
20 Respondent’s housekeeping program and the need to avoid safety hazards related to accumulated  
grain dust. (R. Posttrial Br. at 9–10, 12–13.)

Respondent’s affirmative defenses are not persuasive because the evidentiary record  
shows that Respondent was fine with Harold Baxter’s supervision and employees’ cleaning  
25 practices until August 12, when Respondent changed course after the Union requested voluntary  
recognition. Regarding Baxter, Respondent was content to let him independently supervise  
employees at the grain elevator in his role as assistant superintendent. To be sure, Respondent  
demoted Harold Baxter to assistant superintendent in September 2019. By March 2020,  
however, Harold Baxter was the lead supervisor at the grain elevator (albeit still with the title of  
30 assistant superintendent), and Respondent permitted him to carry out his duties with limited, if  
any, oversight. (See FOF, Section II(A)(1), (G)(1)–(2).)

As for the additional cleaning that Respondent demanded starting on August 12, that was  
a clear departure from the long-standing practice of having employees clean at the end of the  
35 day. There is no evidence that the additional cleaning on/after August 12 was prompted by an  
accumulation of grain dust in priority areas that exceeded the 1/8–inch threshold specified in  
Respondent’s housekeeping policy. Instead, the evidentiary record shows that after the Union’s  
August 12 visit, Hamilton came down to the grain elevator and simply started barking out orders  
to employees because that was how Respondent was going to do things if employees were going  
40 to seek to unionize. (See FOF, Section II(A)(4), (G)(1), (3).)

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<sup>15</sup> Respondent also maintains that the General Counsel’s witnesses were not credible in their  
testimony about Respondent’s closer scrutiny of work assignments. (See R. Posttrial Br. at 12 fn. 8.) As  
indicated in the Findings of Fact, I found Zachary Baxter, Patrick Baxter and Harold Baxter to be credible  
when they described how Hamilton and Fanton increased their scrutiny of employees on and after August  
12. (See FOF, Section II(A)(1), (G)(1)–(2).)

I find that Respondent's affirmative defenses fall short as to the more onerous working conditions alleged in the complaint, as Respondent failed to show that it would have taken the disputed actions in the absence of employees' union activities.

- 5           5. Analysis – affirmative defense for changes to employee benefits (moving the location of smoking area and smoking receptacle, prohibiting employees from storing personal items in company warehouse, and prohibiting employees from clocking in before 6:45 a.m.)

10           There is no dispute that Respondent made changes to various employee benefits on August 12–14, shortly after the Union visited and requested voluntary recognition. First, Respondent moved the designated smoking area and smoking receptacle away from the back office deck and into the gravel parking lot. According to Respondent, the original smoking area was too close to the back office (which included a break room, lockers and an office) and a tool shed where, according to Fanton, flammable materials were stored. (See R. Posttrial Br. at 11–12.) As indicated in the Findings of Fact, I do not credit Respondent's explanation for why it moved the smoking area and smoking receptacle. Respondent maintained the smoking area in its original location for several years, and even installed an awning to make the back office porch more comfortable for employees. Further, when someone moved the smoking area/receptacle back to the original location on about August 17, Respondent did nothing about the issue for a few weeks, which further undercuts Respondent's assertion that the original smoking area location violated Respondent's smoking area policy (which is aimed at keeping the smoking area at least 35 feet away, or separated by a wall or other suitable barrier, from operational areas or areas where materials that pose a hazard are processed or stored). (See FOF, Section II(A)(5), (G)(4).)

25           Second, Respondent prohibited employees from storing personal items in a warehouse at the Owensboro facility. Respondent maintains that it implemented this rule at the request of the entity that rented the warehouse starting in May 2020, (see R. Posttrial Br. at 8–9), but I did not credit Hamilton's vague testimony that the warehouse tenant requested that personal items be removed from the warehouse. To the contrary, I credited Harold Baxter's testimony that he believed the tenant was fine with employee K.C. storing personal items in the warehouse, and note that consistent with Baxter's testimony, Respondent permitted employee K.C. to store items in the warehouse for several months before Respondent prohibited the practice on about August 13. (See FOF, Section II(G)(6).)

35           Third, Respondent prohibited employees from clocking in before 6:45 a.m., citing its preference for having all employees "on the same page" when starting their shifts, and noting that employees might be able to clock in earlier when operational needs required that (e.g., during a busy season). (See R. Posttrial Br. at 9–10.) Before announcing the new restriction, Respondent followed a more flexible and informal clock-in procedure under which some employees clocked in between 6:10 and 6:30 a.m. to start the day's work (e.g., starting machines, performing maintenance) while other employees clocked closer to 7 a.m. (See FOF, Section II(A)(3), (G)(5).) Considering the evidentiary record, I do not find that Respondent would have changed its clock-in procedures in the absence of the employees' union activities. Respondent permitted the flexible clock-in procedures for months (if not years) without objection, and it was not until the Union requested recognition that Respondent decided it needed to adopt a stricter clock-in policy.

Based on the foregoing discussion, I find Respondent fell short with each of its affirmative defenses for decreasing employee benefits after the Union requested recognition on August 12.

## 6. Analysis – affirmative defense for discharging Zachary Baxter

To defend against the allegation that it unlawfully discharged Zachary Baxter, Respondent maintains that Zachary Baxter simply quit his employment with Respondent because he was taking another job, and in the alternative maintains that Respondent did not permit Zachary Baxter to switch to part-time status because he wanted to work part-time shifts on weekends and Respondent does not hire employees for part-time weekend work. (See R. Posttrial Br. at 16–17, 20–21.)

As indicated in the Findings of Fact, neither of Respondent’s affirmative defenses has merit. First, the evidentiary record shows that Respondent terminated Zachary Baxter’s employment. On about August 10 or 11, Zachary Baxter asked both Harold Baxter and Hamilton to switch to part-time status because he would be starting a full-time job with another employer. Hamilton and Harold Baxter approved Zachary’s Baxter’s request. After the Union requested recognition on August 12, however, Respondent (through Hamilton) severed ties with Zachary Baxter by terminating his employment on August 14 and indicating that he was not eligible for rehire.<sup>16</sup> (FOF, Section II(D), (H).)

Second, the evidentiary record undercuts Respondent’s contention that it did not hire employees for part-time work on weekends. Respondent’s employee handbook explicitly states that Respondent hires both full-time and part-time employees. Consistent with that policy, in 2019, Respondent (through both Harold Baxter and Respondent’s human resources department) permitted Zachary Baxter and employee A.L. to work part-time at the Owensboro facility, including (as to Zachary Baxter) part-time work on weekends. (FOF, Section II(A)(2).)

## 7. Summary and conclusion

In sum, the General Counsel met its burden of proving that Respondent violated Section 8(a)(3) and (1) of the Act by taking adverse employment action against its employees in retaliation for their decision to seek union representation. Before the Union arrived on the scene on August 12, Respondent was fine with the following practices at the Owensboro facility: employees working independently under the supervision of Harold Baxter; employees’ cleaning practices; the original smoking area location; employees storing personal items in the warehouse; flexible clock-in times; and employees working at the facility on a part-time basis. Once the Union requested recognition on August 12, Respondent decided to retaliate against employees by

<sup>16</sup> Respondent makes much of the fact that Harold Baxter stated in his original affidavit that Zachary Baxter “quit” his employment with Respondent. (See R. Posttrial Br. at 20–21.) However, Harold Baxter clarified via a supplemental affidavit and trial testimony that Zachary Baxter sought to switch from full-time to part-time status with Respondent but was not permitted to do so. (See Tr. 202, 215–216, 219–220.) To the extent that any questions remained, however, Hamilton cleared them up when he acknowledged that Zachary Baxter asked to work part-time on weekends and confirmed that Respondent did not grant that request. (Tr. 118.)

eliminating/modifying these practices, as demonstrated by (among other evidence) the suspicious timing of the changes, Hamilton’s statement to Baxter on August 13 (“if that’s the way they want to play, then that’s [the] way we’re going to do it”), and the pretextual reasons provided for the changes to Respondent’s practices. Accordingly, I find that Respondent violated the Act as alleged in the complaint.<sup>17</sup> See *1621 Route 22 West Operating Co., LLC*, 364 NLRB No. 43, slip op. at 3, 16–20 (2016) (employer violated Section 8(a)(3) and (1) of the Act by eliminating a job position and transferring work to employees outside of the bargaining unit in retaliation for employees’ union activities), enfd. 725 Fed. Appx. 129 (3d Cir. 2018); *Chinese Daily News*, 346 NLRB 906, 909 (2006) (same, where employer increased an employees’ workload in retaliation for the employee’s protected activities), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007); *Advertiser’s Mfg. Co.*, 280 NLRB 1185, 1185 fn. 2, 1189–1198 (1986) (same, where employer made various changes to employee working conditions in retaliation for employees’ union activities), enfd. 823 F.2d 1086 (7<sup>th</sup> Cir. 1987).

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By, on about August 12, 2020, and in retaliation for employees’ union activities, decreasing benefits by prohibiting employees from clocking in before 6:45 a.m., prohibiting employees from storing items in a warehouse at Respondent’s Owensboro facility, and moving the designated smoking area and smoking receptacle, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By, on about August 12, 2020, and in retaliation for employees’ union activities, imposing more onerous and rigorous terms and conditions of employment by requiring employees to engage in additional cleaning duties and subjecting employees to closer scrutiny of their work assignments, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By, on about August 14, 2020, and in retaliation for his union activities, discharging employee Zachary Baxter instead of permitting him to continue working for Respondent on a part-time basis, Respondent violated Section 8(a)(3) and (1) of the Act.

6. The unfair labor practices stated in conclusions of law 3–5, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

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<sup>17</sup> In finding that Respondent discriminated against employees in violation of the Act, I recognize that (putting aside discrimination and any bargaining obligations) an employer might lawfully decide to take employment actions similar to those at issue in this case. The evidentiary record, however, shows that Respondent was motivated to take the adverse employment actions here in (immediate) retaliation for the employees’ decision to seek union representation on August 12. As a result, the adverse employment actions were discriminatory and violate Section 8(a)(3) and (1) of the Act. See *North Carolina Prisoner Legal Services*, 351 NLRB 464, 464, 484, 486–487 (2007) (finding that the employer violated the Act by changing employee benefits because the employees engaged in protected activities, and noting that the employer’s business justifications for the changes were pretexts to cover up the illegal motivation).

## REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having discriminatorily prohibited employees from clocking in before 6:45 a.m., and having discriminatorily prohibited employees from storing personal items in the warehouse at the Owensboro facility, must make all affected employees whole for any loss of earnings or benefits that resulted from these unlawful employment actions. Backpay for these violations shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6<sup>th</sup> Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). This includes reimbursing employees for any expenses resulting from Respondent's unlawful changes to their benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), aff'd. 661 F.2d 940 (9<sup>th</sup> Cir. 1981), with interest as set forth in *New Horizons* and *Kentucky River Medical Center*, supra.<sup>18</sup>

Respondent, having discriminatorily discharged Zachary Baxter, must offer him reinstatement to his part-time position or, if the position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed absent the discrimination against him. Respondent must also make Zachary Baxter whole for any loss of earnings and other benefits. The make whole remedy shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Respondent shall also be required to expunge from its files any references to its unlawful decision to discharge Zachary Baxter, and within 3 days of thereafter shall notify Zachary Baxter that this has been done and that the unlawful decision will not be used against him in any way.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall compensate all bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award. In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016) and *Cascades Containerboard Packaging – Niagara*, 370 NLRB No. 76 (2021), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 25: a report allocating backpay to the appropriate calendar year(s); and a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award. The Regional Director will then assume responsibility for transmitting the report and form(s) to the Social Security Administration at the appropriate time and in the appropriate manner.

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<sup>18</sup> The parties may use the compliance phase of the case to establish whether, and the extent that, employees lost earnings or benefits or incurred expenses as a result of Respondent's unlawful discrimination concerning clock-in times and using the warehouse to store personal items. I have not included Respondent's unlawful decision to move the smoking area and receptacle in this aspect of the remedy because I do not have a basis to conclude or infer that the change to the smoking area/receptacle location caused employees to lose any earnings or benefits or incur any expenses.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>19</sup>

# ORDER

Respondent, Gavilon Grain, LLC, Maceo, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Decreasing benefits in retaliation for employees' union activities.

(b) Imposing more onerous and rigorous terms and conditions of employment in retaliation for employees' union activities.

(c) Discharging employees in retaliation for their union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employees whole for any and all loss of wages and other benefits incurred as a result of Respondent's unlawful decisions (on about August 12, 2020) to prohibit employees from clocking in before 6:45 a.m. and prohibit employees from storing personal items in Respondent's warehouse at the Owensboro facility, with interest, as provided for in the remedy section of this decision.

(b) Make Zachary Baxter whole for any loss of earnings and other benefits suffered as a result of its unlawful decision to discharge him instead of permitting him to continue working for Respondent on a part-time basis, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful decision to discharge Zachary Baxter and, within 3 days thereafter, notify him in writing that this has been done and that the unlawful decision will not be used against him in any way.

(d) Compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s), and a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

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<sup>19</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Maceo, Kentucky, a copy of the attached notice marked "Appendix."<sup>20</sup> Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 12, 2020.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 12, 2021.




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Geoffrey Carter  
Administrative Law Judge

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<sup>20</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Respondent customarily communicates with its employees by electronic means.

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT decrease benefits in retaliation for employees' union activities.

WE WILL NOT impose more onerous and rigorous terms and conditions of employment in retaliation for employees' union activities.

WE WILL NOT discharge employees in retaliation for their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make employees whole for any and all loss of wages and other benefits incurred as a result of our unlawful decisions (on about August 12, 2020) to prohibit employees from clocking in before 6:45 a.m. and prohibit employees from storing personal items in our warehouse at the Owensboro facility.

WE WILL make Zachary Baxter whole for any loss of earnings and other benefits suffered as a result of our unlawful decision to discharge him instead of permitting him to continue working for us on a part-time basis.

WE WILL remove from our files any references to our unlawful decision to discharge Zachary Baxter and, within 3 days thereafter, notify him in writing that this has been done and that the unlawful decision will not be used against him in any way.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the

backpay awards to the appropriate calendar year(s), and a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

GAVILON GRAIN, LLC

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov)

Minton-Capehart Federal Building, 575 N. Pennsylvania Avenue, Room 238, Indianapolis, IN 46204-1577  
(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/25-CA-264907](http://www.nlr.gov/case/25-CA-264907) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 991-7644.